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Supreme Court, U.S.
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No. 02-1190

In The

Supreme Court of the United States

Paul Cole,

Petitioner,

v.

Builders Square and Cuprum, S.A. de C.V.,

Respondent.

On Petition for A Writ of Certiorari to The United States Court of Appeals for The Ninth Circuit

REPLY BRIEF

Michael H. Bloom
Counsel of Record for Petitioner
522 SW Fifth Ave., Ste. 1125
Portland, Oregon 97204
(503),223-2608

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INTRODUCTION

Cuprum offers a four-pronged response to Cole's Petition. First, it maintains that Cole did not raise the quantum-of-evidence issue before the Ninth Circuit. Not only did Cole raise the issue, but the Ninth Circuit specifically rejected Cole's position and relied on the federal standard in affirming.

Second, Cuprum contends that the sufficiency of evidence to establish a prima facie case under the Oregon summary judgment rule is no different than that under federal Rule 56. While it is true that when Oregon first enacted its summary judgment rule in 1975, it patterned the rule after the federal version. Since its enactment, however, the Oregon Courts have developed and relied upon their own body of law for the rule's interpretation. Moreover, the Oregon Supreme Court has specifically held that this Court's 1986 "trilogy" of cases, including *Anderson v. Liberty Lobby*, interpreting Rule 56, do not apply to the Oregon rule. The Oregon Court has also made clear that, unlike the federal standard, the substantive burden of proof is not to be considered in determining whether the evidence is sufficient to establish a *prima facie* case.

Third, Cuprum contends that Cole's Petition is not review worthy because it involves nothing more than the Ninth Circuit's misapplication of a *correct* rule of law. Cole's position, however, is that the Court of Appeals applied an *incorrect* rule of law. Instead of applying the federal sufficiency of evidence standard, it should have applied the Oregon standard. This point has already been sufficiently briefed in Cole's Petition and warrants no further response.

Finally, Cupum contends that regardless of the applicable sufficiency of evidence, the facts do not support a punitive damage claim – a point that Cole has also sufficiently covered in his Petition. It, too, warrants no further response.

ARGUMENT

A. Cole Has Properly Raised and Preserved the Quantum-of-Evidence Issue

Cuprum maintains that Cole never raised the quantum of evidence issue before the Ninth Circuit, and that by citing *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242 (1986), he has asserted "diametrically opposite position[s]." To support this, Cuprum carefully selects certain excerpts from the record, while ignoring others.

Cole properly raised and preserved the quantum of evidence issue in his briefing before the Ninth Circuit. Moreover, only a few days after the Oregon Supreme Court decided *Bolt v. Influence,* 333 Or. 572, 43 P.3d 425 (2002), and well before oral argument, he presented the Ninth Circuit with a Supplemental Memorandum of Authority on this very issue. In it, he stated in part:

> In the briefing, the parties disagree as to the quantum of evidence necessary to defeat a summary judgment motion against a punitive damage claim. Cuprum contends that Cole was required to "submit clear and convincing evidence." Cuprum's Answering Brief at 24. Cole, on the other hand, contends that the submission of evidence supporting an inference of conduct giving rise to punitive damages is sufficient. Cole's Opening Brief at 28; Cole's Reply Brief at 18.
>
> On March 28, 2002, the Oregon Supreme Court in *Bolt v. Influence Inc.* SC, S48510, 2002 Ore. LEXIS 217 (March 28, 2002), held that the "clear and convincing" burden of proof governing the recovering of punitive damages

> does not apply in determining the sufficiency of evidence to defeat a motion for directed verdict:
>
> . . . .

Supplemental Authority, Supp. App.-1A-2A.

Cuprum does not assert that the Supplemental Authority was not timely. Nor can it. The memorandum was filed on April 2, 2002 – only four days after *Bolt* was decided – and only seven weeks after Cole filed his Reply Brief.

More pointedly, in the more than five months between its filing and oral argument,[1] Cuprum never once asserted that it was untimely or that it raised issues not before the Ninth Circuit. In fact, Cuprum neither responded nor objected to Cole's filing.

Cuprum also mischaracterizes Coles' reference to *Anderson v. Liberty Lobby. Inc.* Cole merely cited *Anderson* for the proposition that "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Resp. App.- 3-4. A principle that is consistent with Oregon law. *See, e.g., Jones v. General Motors*, 325 Or. 404, 939 P.2d 608 (1997).

Cuprum also accuses Cole of "embracing" the federal standard in his Petition for Rehearing before the Ninth Circuit. To the contrary, after the Ninth Circuit rejected Cole's position and affirmed on the ground that the federal standard, not the Oregon standard, applied, Cole argued on rehearing that his claim nevertheless met the federal standard:

> This panel's rationale for [affirming] – that the Magistrate was entitled to apply the federal

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[1] Oral argument did not occur until September 9th, 2002, more than five months later.

> standard rather then the Oregon standard to the quantum of evidence necessary to overcome the moving party's summary judgment motion – cannot justify the error.

Petition for Rehearing, Supp. App.-5A.

That Cole made the alternative argument that his claim met the more onerous federal standard, after the Ninth Circuit rejected his contention that the State standard applied, can hardly be considered "embracing" the federal standard, as Cuprum argues.

Finally, the Ninth Circuit itself confirmed that Cole had properly preserved the quantum-of-evidence issue by specifically rejecting Cole's position and relying on the federal standard to affirm:

> Federal law applies to the "question of the quantum of proof necessary to sustain a cause of action." The federal standard requires the court to "view the evidence presented through the prism of the substantive evidentiary burden," which is precisely what the district court did. Because we conclude that the district court properly applied the relevant standard, *we affirm on this issue.*[2]

B. Oregon's Summary Judgment Law Does Not Incorporate *Anderson v. Liberty Lobby's* Evidentiary "Prism"

Cuprum argues that Oregon's summary judgment rule [ORCP 47] mirrors the federal rule as to the quantum of

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[2] *Cole v. Builders Square, Inc.* 48 Fed. Appx. 684 (2002) (footnotes omitted), Pet. App. at 3a-4a (footnotes omitted) (emphasis added).

evidence necessary to establish a prima facie case. Accordingly, under its view, a plaintiff who meets the federal standard also satisfies the state standard. But such is contrary to Oregon caselaw.

Oregon first enacted its summary judgment rule in 1975. The rule was patterned after federal Rule 56. Since its enactment, however, the Oregon courts have developed and relied upon their own body of law for the rule's interpretation.

Importantly, that body of law has not adopted this Court's well-known "trilogy" of decisions interpreting Rule 56,[3] which includes *Anderson v. Liberty Lobby* and its holding that the sufficiency of evidence for a summary judgment motion must be viewed through the "prism" of the substantive burden of proof.[4] *Jones v. General Motors Corp.*, 325 Or. 404, 420, 939 P.2d 608 (1997).

Indeed, in *Jones*, the Oregon Supreme Court expressly rejected any notion that the "three 1986 decisions of the United States Supreme Court . . . interpret[ing] FRCP 56 should influence [the] construction of the 1995 amendment to ORCP 47C[]" just because ORCP 47 was patterned after Rule 56. *Id.* at 416. It emphasized that since the rule's enactment, its interpretation has been based on Oregon law, not federal law:

> The 1986 federal cases on which defendants rely did not exist when Oregon enacted ORS 18.105 (1975) [Oregon's summary judgment rule].

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[3] The cases comprising the "triology" are: *Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574, (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

[4] 477 U.S. 242, 248 (1986).

> What did exist when the legislature amended the rule in 1995 was the then-current version of ORCP 47C and a substantial body of case law from this court that had interpreted that rule. In 1995, the legislature amended *Oregon's summary judgment rule, not FRCP 56.*

Id. at 418-19 (emphasis added).

Cuprum nevertheless points to *Onita Pacific Corp. v. Trustees of Bronson*, 122 Or. App. 452, 858 P.2d 453 (1993), a decision from Oregon's lower appellate court. It claims that *Onita* stands for the proposition that Oregon *does* incorporate the "clear and convincing" evidentiary standard in determining the sufficiency of a prima facie claim for punitive damages.

However, the same court that decided *Onita* has since questioned its viability. *See Lakin v. Senco Products, Inc.* 144 Or. App. 52, 925 P.2d 107 (1996), *aff'd.* 329 Or. 62, 987 P.2d 463 (1999). In *Lakin*, the very appellate court that decided *Onita* expressed serious doubts as to whether the sufficiency of evidence to establish a prima facie punitive damage claim should be viewed through a clear and convincing "prism" instead of the "any-evidence" standard. *Lakin v. Senco Products, Inc.* 144 Or. App. at 71 n.16.[5]

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[5] The *Lakin* court stated:

> The parties agree that we should review the "clear and convincing" sufficiency of evidence pertaining to entitlement to punitive damages under the standard expressed in *Onita Pacific Corp.* That is, rather than determining whether there is any evidence to support the verdict, *see, e.g., Brown v. J.C. Penney Co.*, 297 Or. 695, 705, 688 P.2d 811 (1984); *Hall v. Gordon*, 284 Or. 49, 51, 584 P.2d 1374 (1978), we should determine whether there is any evidence from which the jury could have found "wanton disregard" by clear and convincing

The Oregon Supreme Court has since confirmed that the lower appellate court's doubts were well founded by its decision in *Bolt*. *Bolt* established once and for all that the "any-evidence" standard, not the clear and convincing standard, applies when determining whether a party has presented sufficient evidence to establish a *prima facie* punitive damage claim. *Bolt v. Influence,* 333 Or. 579-80

Cuprum suggests *Bolt* should be read narrowly and its application confined to the amendment of pleadings. But even Oregon's Supreme Court refuses to confine *Bolt's* application in this manner. *Woodbury II v. CH2M Hill, Inc.* 335 Or. 154, 61 P.3d 154 (2003) ("This court reviews the denial of a motion for directed verdict for *any evidence* to support the verdict in plaintiff's favor. *See Bolt v. Influence, Inc.*, 333 Or. 572, 577-78, 43 P.3d 425 (2002)" (emphasis added)).

Bolt's holding is clear. In passing on the sufficiency of evidence for a punitive damage claim, court's shall not weigh the evidence through a clear and convincing "prism." The proper standard is the "any evidence" standard. *Bolt v.*

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evidence. We note that *Onita Pacific Corp.* is not necessarily consistent with other authority addressing our standard of review for claims requiring proof by "clear and convincing" evidence. *See, e.g., Faber v. Asplundh Tree Expert Co.*, 106 Or. App. 601, 606, 810 P.2d 384 ("The clear and convincing evidence standard relates to how a jury weighs the evidence, not to how a trial court assesses the capability of the evidence to establish facts."), *rev. den.* 312 Or. 80, 816 P.2d 610 (1991). However, because we conclude that the proof was sufficient under either standard of review to establish plaintiffs' entitlement to punitive damages, we need not resolve which standard is the proper one.

Lakin v. Senco Products, Inc. 144 Or. App. at 71 n

Influence, 333 Or. at 579-80.

Finally, Cuprum suggests that the appropriate standard is "sufficient evidence" rather than "any-evidence." Although both terms have been used to define the standard, they are synonymous in the eyes of the Oregon courts. Cuprum's argument over the semantics of the terms, however, misses the point. The point is that when Oregon courts are asked to determine whether evidence is sufficient to withstand a motion for summary judgment, they properly use the standard applicable to directed verdicts. *Jones v. General Motors Corp.*, 325 Or. 404, 414, 939 P.2d 608 (1997) (quoting *Seeborg v. General Motors Corporation*, 284 Or. 695, 700-01, 588 P.2d 1100 (1978).) And as the Oregon Supreme Court made abundantly clear in *Bolt*, that standard, unlike the federal standard, does *not* view the evidence through a "prism" of the substantive burden of proof.

CONCLUSION

Jury participation has always been an important part of resolving disputes in Oregon. As early as 1854, Oregon's Supreme Court cautioned that, "[w]henever there is any evidence tending to prove a fact within the issue, the jury must pass on it[.]" *Latshaw v. Territory*, 1 Or. 140, 142 (Or. Terr.1854) (emphasis in original). By the 1920s, it had declared the any-evidence standard to be "definitely settled in this state." *Farrin v. State Indus. Acc. Comm.*, 104 Or. 452, 461, 205 P. 984 (1922). In *Bolt* the court reaffirmed that "the jury must be permitted to consider every claim on which the plaintiff has presented *some* evidence tending to establish each element of that claim." *Bolt v. Influence,* 333 Or. at 578 (emphasis original). That principle should not suddenly disappear simply because a defendant removes the case to federal court.

Respectfully Submitted,

Michael H. Bloom
Bloom & Schuckman, PC
522 SW 5th Avenue, Suite 1125
Portland, Oregon 97204
(503) 223-2608

Counsel of Record for Petitioner
Paul Cole

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